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No. 93-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PREFERRED COMMUNICATIONS, INC.,
Petitioner,

v.

CITY OF LOS ANGELES and DEPARTMENT OF WATER AND POWER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Contrary to Petitioner's assertion, the evidence below showed that the construction and operation of a cable television system requires the installation and maintenance of hundreds of miles of cable plant and wires traversing over and under public streets and rights-of-way held in fee or easement by Respondents. The question presented, therefore, should be phrased as follows:

1. In light of the fact that a cable television system inherently involves the ongoing, non-transient use of municipal streets and rights-of-way, may a municipality, consistent with the First Amendment, condition use by cable operators of city property through the same franchise process that it has uniformly and historically applied to all similarly-situated users of its streets and rights-of-way?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Respondents incorporate by reference the Opinions Below section in the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the court of appeals was entered January 7, 1994. The Petition for Writ of Certiorari was filed April 5, 1994. Preferred invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), but Respondents contend that Preferred lacks standing, and that the courts below and this Court therefore lack jurisdiction. This contention is discussed in Respondents' Conditional Cross-Petition for Certiorari in No. 93-1759, filed pursuant to Rule 12.3 on May 5, 1994.

STATUTES INVOLVED

California Government Code §§ 53066 and 53066.3 are set forth in the Appendix at pages 1a-4a.

STATEMENT OF THE CASE

Respondents incorporate by reference the Statement of the Case in the Conditional Cross-Petition for Certiorari filed in No. 93-1759 on May 5, 1994.

REASONS FOR DENYING THE PETITION

It is undisputed that certain aspects of cable television, such as an operator's programming decisions, "plainly implicate First Amendment interests." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). *See also Leathers v. Medlock*, 499 U.S. 439, 450 (1991). Courts throughout the country are considering the appropriate balance between those interests and the "competing societal interests" embodied in municipal cable franchising. *Preferred*, 476 U.S. at 495. The Petition here, however, presents neither the questions nor the record for the Court to provide meaningful guidance on these difficult constitutional issues. The Petition should be denied for several independent reasons, each of which is discussed in further detail below:

1. On the questions presented by Petitioner, the decision does not conflict with any decision of this Court or any court of appeals. Indeed, Preferred does not contend otherwise.

2. The questions presented rest entirely on Petitioner's factual assumption that the wires and facilities of cable systems make no use of public streets or rights-of-way in which the City has a property interest (*e.g.*, Pet. at i, 3 & 24). In fact, the record below demonstrates just the opposite: Cable systems occupy hundreds of miles of public streets and rights-of-way held by the City in fee or through easements. In any event, the Court could not reach the constitutional issues posed by Petitioner without

first resolving this factual issue, which Preferred never squarely presented to the courts below.

3. The questions presented also depend on Petitioner's reading of Cal. Pub. Util. Code § 767.5, an interpretation that is clearly contradicted both by Cal. Pub. Util. Code § 767.5(a)(1), and by a provision of state law not cited by Preferred, Cal. Gov't Code § 53066. Indeed, Petitioner's reading of Cal. Pub. Util. Code § 767.5 was rejected by the only courts that have addressed the issue. *See* note 9 *infra*. In any event, the Court could not even reach the First Amendment issues presented without first ruling on the applicability of Section 767.5 to Los Angeles' Department of Water and Power ("DWP"), and the relationship of Cal. Pub. Util. Code § 767.5 and Cal. Gov't Code § 53066, purely state law questions squarely raised in this case for the first time in the Petition.

4. In remanding the case and directing Los Angeles to issue a Notice of Sale ("NOS") for an additional franchise, the court of appeals outlined five possible outcomes. Three of these scenarios would result in Preferred lacking standing; one would result in mootness. In only one of the five scenarios posited by the court of appeals would there possibly remain constitutional issues to be resolved. The court of appeals concluded that, under the particular circumstances of this case, "it would be precipitous of us to reach [these difficult constitutional issues] at this time." Pet. App. at A67.

5. Respondents contend that Preferred lacks standing for the reasons set forth in the Conditional Cross-Petition in No. 93-1579 at i, 10-14. At best, Preferred's standing is marginal, and prudential considerations suggest that a borderline case or controversy does not present a proper occasion for resolving complex constitutional questions.

6. The decision of the court of appeals is clearly correct insofar as the questions presented in the Petition are concerned.

DISCUSSION

In 1983 Preferred mounted a wholesale attack on every aspect of the City's cable franchising requirements. It did so despite the fact that it had never applied for a franchise. Perhaps more importantly, discovery conclusively revealed that Preferred lacked all indicia of being a bona fide business, much less one with the financial, technical, and managerial expertise that the record demonstrated was necessary to construct, operate and maintain what Preferred itself conceded would be a multimillion dollar cable system.

While the courts below held that these deficiencies did not deprive Preferred of standing, the deficiencies nevertheless have shaped the litigation and the record in a way that would make this case a very shaky foundation indeed on which to construct constitutional doctrine. The court of appeals recognized this, vacating most of the district court's rulings on the constitutionality of specific franchise requirements. Otherwise, the court concluded, "we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta." Pet. App. A68 (citation omitted). This Court should heed the concerns expressed by the court of appeals, and deny the Petition.

1. *This Case Does Not Present A Conflict In The Circuits.* On the questions presented by Petitioner, the decision of the Ninth Circuit does not conflict with any decision of this Court or the courts of appeals.[1] To be

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[1] *Amici* United States Telephone Association and Bell Atlantic misleadingly attempt to create a conflict by referring to two courts of appeals decisions. Amicus Br. at 14 & n.13 (citing *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); and *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982)). But as even *amici's* description of those cases makes clear, each, at best, involved an issue arguably related only to the Conditional

sure, the circumstances under which the activities of cable television operators "implicate First Amendment interests" raise a variety of constitutional issues.[2] The lower courts have started to address these issues, but few cases have yet been decided by the courts of appeals. The Court should not attempt to address these constitutional questions until the courts of appeals have had more opportunities to consider the issues in different contexts.

Cross-Petition: The scope of a municipality's authority to limit the number of cable franchises granted. *None* of the cases cited addressed, much less conflicted with the decision below on, the question presented here: The constitutionality of the City's NOS process.

Moreover, *amici's* fixation with "exclusive" franchises leads them to mischaracterize both the record and the case law. Thus, *amici* assert that the City grants exclusive franchises; even Petitioner begrudgingly concedes that is not so. Pet. at 16. Similarly, they claim that the 1992 Cable Act "limited, but did not forbid, exclusive franchises" (Amicus Br. at 15), even though that Act explicitly prohibits exclusive franchises, 47 U.S.C. § 541(a)(1). Precedent cited by *amici* confirms this. *See Cox Cable Communications, Inc. v. United States*, 992 F.2d 1178 (11th Cir. 1993) (cited merely as subsequent history to district court decision in Amicus Br. at 13 n.12). Through this deceptive description of the current legal status of "exclusive" franchises, *amici* apparently seek to lure the Court into departing from its long-settled doctrine of refraining from addressing constitutional issues when it is not necessary to do so. *See Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

[2] Indeed, this Court has one such case pending. *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 819 F. Supp. 32 (D.D.C. 1993), *prob. juris. noted*, 62 U.S.L.W. 3241 (U.S. Sept. 28, 1993) (No. 93-44) (argued Jan. 12, 1994). *Amici's* suggestion (Amicus Br. at 2) that this case is a "logical successor" to *Turner*, however, is mystifying. Since this Court has not yet decided *Turner*, it is surely premature for *amici* to designate a "logical successor." Moreover, the court of appeals here has already directed the district court to take the Court's guidance in *Turner* into account on remand. *See* Pet. App. A68 n.7.

2. *The Court Would Have To Resolve A Factual Dispute Before Reaching The Constitutional Issues Since The Questions Presented Rest On A Factual Assumption Contradicted By The Record.* Each of the questions presented by Petitioner depends on the following factual assumption: Cable systems make no use of municipal rights-of-way or other property. *E.g.*, Pet. at i & 24. In fact, Respondents believe the uncontroverted record supports exactly the opposite conclusion. Because Preferred never squarely raised this issue below, however, neither the district court nor the court of appeals ever addressed what now appears to be a factual dispute. As a result, before the Court could even reach the constitutional issues, it would first have to review the evidence to determine ownership of the rights-of-way used by cable systems in Los Angeles. Such a factual inquiry would be directly contrary to the Court's stated position that it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041 (1984). Moreover, the Court will "refrain from addressing issues not raised in the Court of Appeals." *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). *See also, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 n.5 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

The questions presented assume that the City of Los Angeles has no property interest in the rights-of-way on which cable operators place their wires and facilities. Preferred claims that the easements and rights-of-way belong to private utility companies (Pet. at 24), but not surprisingly offers no record support for this assertion.[3]

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[3] Indeed, on its face, the Pacific Telephone pole attachment agreement appended to the Petition contradicts Preferred's assertion. The agreement makes plain that it grants the user no rights to the underlying property, but instead requires the user to obtain such rights from property owners as a precondition to applying for pole attachment service. Pet. App. A203 at ¶ 9.

The record, in fact, makes abundantly clear that cable operators place their wires and facilities on utility poles located in public rights-of-way, or in underground conduit placed beneath public streets. *E.g.*, CR 445 at ¶¶ 5-8; CR 450 at ¶¶ 11-12; CR 452 at ¶ 6.[4] Such property is either held by the City in fee, or owned in fee by the abutting property owners with a permanent easement granted to the City for right-of-way purposes. CR 445. The property was obtained by the City either through negotiated settlements, eminent domain procedures, or was dedicated to the City pursuant to some form of subdivision approval process. *Id.*

Although Preferred never pursued this point below, and thus the opinions do not clearly address it, the courts below clearly understood that Los Angeles has an interest in the property used by cable operators. For example, the district court said:

> As with other franchisees, cable operators benefit from the use of public property, streets, rights-of-way, and easements. The City argues that, like other property owners, it has a legitimate interest in receiving adequate compensation for use of its property by private users. As the trustee of public property on behalf of its residents, the City has a special duty to see that the public receives adequate compensation for use of public property by private commercial enterprises, such as cable operators, who make ongoing and comprehensive use of public property for private gain.[5]

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[4] References to "CR" refer to the Clerk's Record in the courts below.

[5] In fact, the record here makes plain that the cable system Preferred says it wants to build would require the installation of approximately 700 miles of additional cable plant over and under City streets and rights-of-way. CR 174 at Exh. 11; CR 200 at ¶ 7. Thus, Petitioner's suggestion that it does not seek to use City streets and rights-of-way "any more or any differently" than "any other consumer of public utility services" (Pet. at 3) is sheer nonsense.

Pet. App. at A134; *see also* Pet. App. at A78, A87 & A115. Similarly, the court of appeals acknowledged that "cable systems place a strain on public resources: They disrupt traffic and take up public easements and rights of way." Pet. App. at A64. Indeed, this Court recognized that the very same property at issue here—Los Angeles' utility infrastructure—was public property in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 792-93 (1984) (upholding Los Angeles ordinance prohibiting the posting of signs on public property, including utility poles).

In order to reach the constitutional issues raised by Preferred, the Court would first have to determine the validity of Preferred's factual assertion by examining the nature of the City's property interests in the hundreds of miles of street and rights-of-way that Preferred lays claim to. While the City believes that the record and the case law are unambiguous on this point, the Court would nevertheless have to review the record to resolve what is, at best from Petitioner's standpoint, a disputed factual issue. This consideration, standing alone, is more than adequate reason to deny the Petition. *See United States v. Johnson*, 268 U.S. at 227.

3. *The Questions Presented Also Rest On Petitioner's Erroneous Reading Of State Law.* In addition to resting on controverted facts, the questions presented also rest on Preferred's erroneous interpretation of state law, specifically Cal. Pub. Util. Code § 767.5. According to Preferred, cable operators are mere consumers of common carrier pole attachment services under Section 767.5, entitled to make use of all underlying easements and property traversed by the utilities, thereby obviating the need for a cable operator to use municipal right-of-way.[6] Pet. at i, 6 & 24. This issue was also never squarely

[6] Even *amici* take issue with Preferred's characterization of pole attachments as a common carrier service. Amicus Br. at n.20.

presented to the courts below; therefore, neither the district court nor the court of appeals ruled on it.

The problem with Preferred's argument is that it rests on a doubly flawed reading of state law. First, on its face, Section 767.5 does not even apply to municipally owned utilities like the City's DWP. Cal. Gov't Code § 767.5(a)(1) (" 'Public utility' includes any person, firm, or corporation, *except a publicly owned public utility*") (emphasis added). Petitioner's heavy reliance on the regulatory authority of the California Public Utilities Commission ("PUC") is similarly misplaced. Pet. at 5 & 10. As California courts have made clear, the PUC has no jurisdiction over municipally owned utilities like DWP. *See County of Inyo v. Public Utilities Comm'n*, 26 Cal.3d 154, 178 (1980) (California legislature has not granted PUC jurisdiction over municipally owned utilities). Thus, as a matter of state law, Section 767.5 gives Petitioner no right whatsoever to attach to DWP's poles and conduits.[7]

Second, Petitioner completely ignores another provision of state law: Cal. Gov't Code § 53066. Among other things, Section 53066 provides that "No person may commence the construction of a cable television system without a franchise or license granted by the city . . . in which the cable television system will operate." Cal. Gov't Code § 53066(e). It further provides that a franchise awarded by a municipality "authorize[s] the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city . . . . Public easements . . . shall include . . . any easement created by dedication

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[7] *Amici* make a similar error, asserting that poles and conduits are not owned by municipalities, but "are *privately* owned by telephone companies and utilities." Amicus Br. at 16 & n.19 (emphasis in original). In fact, the City, through its DWP, *does* own utility poles and conduits. *E.g.*, CR 152 at ¶¶ 2-17; CR 445 at ¶ 5; CR 448 at ¶ 4.

to the city . . . for public utility purposes or any other purpose whatsoever." [8] Cal. Gov't Code § 53066(d).

In light of Section 53066, Cal. Pub. Util. Code § 767.5 must be construed as applying only to cable operators that have received the franchise required by Cal. Gov't Code § 53066. Petitioner's reading of Section 767.5, in contrast, would render Section 53066 a nullity, since according to Petitioner, any member of the public could obtain access to municipal rights-of-way simply by obtaining so-called "common carrier" pole attachment service under Section 767.5. Not surprising, courts have consistently rejected Petitioner's conclusion.[9]

The point here, however, is not whether the City's or Petitioner's interpretation of the nuances of California law is correct. The point is that in order even to reach the constitutional issues, the Court would first have to resolve the parties' disagreement about state law. That is not the proper role for the exercise of the Court's

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[8] Cal. Gov't Code § 53066.3 further provides that, in determining whether to grant additional cable franchises, a municipality must consider a variety of factors, including "[w]hether there will be an unreasonable disruption or inconvenience to existing users, or any adverse effect or future use, of utility poles, public easements, and the public rights-of-way contrary to the intent of Section 767.5 of the Public Utility Code." Petitioner does not explain how this companion state statute can be squared with its expansive reading of Section 767.5.

[9] *See Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559, 1563-68 & 1574 n.28 (N.D. Cal. 1988); *Group W Cable, Inc. v. City of Santa Cruz*, 679 F. Supp. 977, 979 (N.D. Cal. 1988); *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1333 (E.D. Cal. 1987). *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798 (1985), cited by Petitioner (Pet. at 6), is not to the contrary. *Salvaty* involves the apportionability of a *private* easement granted to a telephone company by a private land owner; it says nothing about access to municipally owned rights-of-way. *Id.* at 800-03. Moreover, *Salvaty* makes clear that the cable operator had already been awarded a franchise giving it access to public streets and rights-of-way. *Id.* at 800-01.

jurisdiction, and in and of itself, is reason to deny the Petition. *Cf. Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (emphasizing that "a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review").

Moreover, since any decision by the Court on the issues presented would necessarily be limited in applicability to the specific circumstances of Cal. Pub. Util. Code § 767.5, such a decision would give little guidance to courts outside of California. This, too, is yet another reason to deny the Petition.

4. *On Remand Preferred May Lack Standing Or The Case May Become Moot.* There is a substantial likelihood that following the remand ordered by the court of appeals, this case will be resolved in a way that will moot the issues the Petition presents. Pet. App. A66-67. The court of appeals ordered Los Angeles to issue an NOS for South Central; Preferred will, of course, have an opportunity to apply. Then, as the court of appeals observed, "we will learn whether Preferred is in fact 'ready, willing and able' to operate a cable system . . . . [I]f Preferred fails to participate we will know it has suffered no injury from the franchise scheme." *Id.* at A66. The court further noted that "[a]lternatively, Preferred may apply but be denied the franchise on the basis that it lacks the requisite technical or financial qualifications. Again, if that's so, Preferred will lack standing to proceed with this litigation." *Id.* Alternatively, "the franchise may also be awarded to another operator who makes a more attractive bid, in which case Preferred will have no standing to challenge any of the restrictions placed on that franchisee." *Id.* at A67. The court also noted that "the auction may result in the award of a franchise to Preferred. . . . If that happens, then all of Preferred's claims for injunctive relief will become moot." *Id.*

Only one scenario would result in further constitutional litigation: "It's also possible Preferred will be denied a

franchise because it failed to satisfy one of the disputed requirements; in that case, we will be able to review the requirement's constitutionality without having to speculate as to its operation or relation to the overall scheme." *Id.*

The court of appeals was clearly, and wisely, hesitant about deciding important constitutional questions in this case when it had yet to "learn whether Preferred is in fact 'ready, willing and able' to operate a cable system . . ." Pet. App. at A66-67. The Court should be equally hesitant, and should deny the Petition.

5. *The Court Should Not Attempt to Address Constitutional Issues In A Case Where Petitioner's Standing Is Marginal At Best.* Respondents contend that Preferred lacks standing, and have filed a Conditional Cross-Petition raising this issue. *See* Cross-Petition in No. 93-1759 at i, 3-4, & 10-14. The standing claim rests on undisputed record evidence establishing that Preferred has none of the characteristics of a bona fide business enterprise. For example, Preferred has no books or records of account, annual reports, profit and loss statements, financial reports, financial statements, budgets, or prospectuses. Cross-Pet. App. 2a. Its only "assets" consist of a "loan" by two of its principals, and an "investment" by friends; neither "asset" is evidenced by any documentation. *Id.*

Neither Preferred nor its principals have ever constructed, owned or operated a cable system. Nor, indeed, have they ever constructed, owned or operated any other type of business related to television. Moreover, Preferred has not entered into any contracts for the planning or construction of the cable system it says it wants to build, or retained any consultants to assist it. Nor has it determined what the anticipated capital costs, operating costs or revenues of its allegedly planned system would be. *Id.* at 2a-3a. Indeed, Preferred was formed just two months before bringing this lawsuit, and it has never applied to the City for a franchise.

While the court of appeals held that these deficiencies do not deprive Preferred of standing, the fact remains that

they have played a key role in shaping the record. Thus, despite ten years of litigation, the court of appeals concluded that review of the City's "franchising requirements is at best difficult and at worst advisory, because Preferred did not participate in the 1982 NOS and has never actually applied for a South Central cable franchise." Pet. App. at A65. This faulty record, and the fact that Preferred's standing can, at best, be characterized as marginal, are yet additional reasons why the Court should not attempt to consider important constitutional issues in the largely speculative context of this case.

6. *The Court of Appeals Correctly Upheld The City's NOS Process.* The court of appeals' decision upholding the City's NOS process is clearly correct. In arguing to the contrary, Petitioner overlooks three critical facts. *First*, the NOS process does not single out cable television or any other so-called distributor of "electronic speech." On the contrary, the process is based on City Ordinance No. 58,200, enacted in 1927, and has been consistently applied to a variety of similarly situated non-transient users of City streets and rights-of-way whose activities have nothing to do with speech, such as street railroads, water, gas and electric utilities, pipeline companies, taxicab companies and non-cable communications line companies.[10]

Thus, the NOS process is simply a requirement of general applicability imposed on all similarly-situated users of City rights-of-way.[11] In urging that cable operators are

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[10] *See* Cross-Petition at 6-8. Thus, *amici's* assertion that utilities, "ordinary businesses," and other rights-of-way users are somehow immune is simply incorrect. *See* Amicus Br. at 17.

[11] Petitioner, joined by *amici*, attempts to obfuscate this point by citing articles alleging abuses by individual local officials in the cable franchising process in other jurisdictions. Pet. at 22-23 & n.34; Amicus Br. at 11 & n.11. As an initial matter, neither Petitioner nor *amici* inform the Court that two of the sources quoted, Messrs. Lee and Hazlett, were expert witnesses hired by Preferred (CR 346; CR 376), and another is a cable industry

entitled to some special, preferential exemption from this process, it is Petitioner, not the City, that urges departure from the Court's precedents. As the Court has made clear, businesses like cable operators that happen to engage in some First Amendment activities enjoy no "special protection from governmental regulations of general applicability simply by virtue of their First Amendment activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). *Accord Leathers v. Medlock*, 499 U.S. at 443-47.

Second, the record here establishes that installation and operation of a cable system necessitates the ongoing, street-by-street occupation of City streets and rights-of-way with hundreds of miles of cable plant. *See* Cross-Petition at 4-5. Common sense dooms Petitioner's attempts to equate such comprehensive appropriation of public property for private use with the relatively minor, transient use of a sidewalk, a quintessential public forum, at issue in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750

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attorney. Moreover, on their face, these unsupported allegations have nothing to do with Los Angeles. They are therefore irrelevant to the constitutionality of the City's NOS process. The Court should no more strike down the City's generally applicable NOS process because of the hypothetical possibility of abuse by individual officials than it should strike down the Internal Revenue Code due to the hypothetical possibility of abuse by individual federal officials in using it to harass publishers. The proper avenue for relief in such instances is to challenge such abuses as they occur on an as applied basis. *Cf. City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 761 (1988) (laws of general application that do not single out First Amendment activities usually not subject to facial challenge).

Similarly, Petitioner criticizes the "contractual" nature of the City's NOS process. Pet. at 14 & n.33. But in light of the fact that a cable system inherently makes long term, ongoing use of City property, there is nothing surprising or suspect about the contractual nature of a franchise. Indeed, under California law, that is what a franchise is: A negotiated contract between a private enterprise and a governmental entity for long-term use of public property. *See Santa Barbara County Taxpayers Ass'n v. Board of Supervisors*, 209 Cal. App. 3d 940, 949 (1989).

(1988).[12] Pet. at 19-20. In claiming that the First Amendment somehow guarantees a right to a speedy and favorable decision permitting it to install hundreds of miles of private plant on public property, Petitioner essentially claims the perpetual right to consume public property to communicate at all times and all places in the manner it chooses. As this Court has made clear, however, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

Third, the City's NOS process bears no resemblance to the standardless, discretionary process struck down in *Lakewood*. As an initial matter, the Lakewood ordinance gave the mayor sole discretion to deny permits, with no standards and no required justification. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. at 769. The City's NOS process, on the other hand, establishes detailed criteria and requires duly noticed public hearings and public input at numerous stages. Cross-Petition at 7-8. Moreover, while the Lakewood ordinance vested essentially unreviewable discretion in a single individual, the City's NOS process requires justification based on the NOS criteria, and is independently acted on by the Board of Telecom-

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[12] The cases cited by *amici* are also inapposite since they too address only minor or transient uses of a traditional public forum or, in some cases, regulation of speech activity making no use of public property at all. Amicus Br. at 5-8 (citing, *e.g.*, *Lakewood; Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992) (assembly and parade ordinance); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (content-based newsrack regulation); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (municipal regulation of adult-oriented businesses making no use of public property); *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988) (regulation of charitable solicitation making no use of public property); *Saia v. New York*, 334 U.S. 558 (1948) (transient loudspeakers); *Schneider v. New Jersey*, 308 U.S. 147 (1939) (handbill distribution)).

munications Commissioners (a board comprised of Los Angeles residents), as well as the City Council and the Mayor, each acting separately in turn in public session. *Id.* In addition, the Lakewood ordinance restricted minimally disruptive use of a traditional public forum, while the City's NOS process regulates much more pervasive and disruptive use of property to which access has always been restricted. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. at 813-15. Finally, the Lakewood ordinance required annual license reapplications, heightening the risk that the mayor's decision might be based on the previous year's editorial decisions. Here, however, the NOS process results in extended franchises, which must be renewed unless the City can meet the stringent renewal criteria of the Cable Communications Policy Act of 1984, 47 U.S.C. § 546.

Unlike the ordinances challenged in *Lakewood* or in the cases cited by *amici*, the City's NOS process is governed not only by the City's own requirements, but by a strict overlay of federal standards and limitations set forth in the federal Cable Act, 47 U.S.C. §§ 521 *et seq.* In addition to limiting the circumstances in which a municipality may not renew a cable franchise, the Cable Act, for example, prohibits a municipality from granting exclusive franchises and from unreasonably refusing to grant a franchise. 47 U.S.C. § 541(a)(1). Moreover, contrary to Petitioner's repeated assertions that the City makes franchise decisions based on a franchise applicant's proposed programming (Pet. at 13-14, 21), the Cable Act flatly prohibits such content-based decisions.[13] *E.g.*,

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[13] Preferred's repeated assertions illustrate the problems in this case created by Preferred's marginal standing. In its 1982 NOS for South Central Los Angeles issued prior to enactment of the Cable Act, the City did require applicants for cable franchises to list the channels they anticipated carrying. Preferred, however, did not exist at the time, and thus was not injured. The 1984 Cable Act subsequently prohibited the practice. Preferred is thus asking the Court to devote its time to a wholly moot issue: The constitu-

47 U.S.C. §§ 544(b)(1) & 546(c)(1)(B). Read together with the federal Cable Act, as it must be, the City's NOS process is a far cry indeed from the ordinances struck down in *Lakewood* and similar cases.

In sum, the court of appeals' decision upholding the NOS process is clearly consistent with the Court's precedent, and presents no occasion for the Court's review.[14]

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tionality of a practice already prohibited by federal statute, which the City has not engaged in for over a decade.

[14] *Amici* would have the Court go far beyond both the record and the questions presented by Petitioner, and venture into advisory opinions on a range of issues posed by modern communications technologies. Indeed, *amici* treat this case as a sort of Rorschach inkblot test, seeing in it all manner of First Amendment issues relating not only to the federal Cable Act, but the Communications Act of 1934 as well. *See* Amicus Br. at 2, 9-12 (questioning, *inter alia*, 47 U.S.C. §§ 214, 301, 309(a), 531(b), 533(b), 542, 544(b)(1), and 544(b)(2)).

Since the questions presented involve only the constitutionality of a process required by municipal ordinance, this case would be a singularly inappropriate vehicle for addressing the broad range of federal statutory policy issues raised by *amici*. That is particularly true since the Court would have to address those issues in a vacuum, as the court of appeals explicitly declined to reach any of the specific City franchising requirements to which the Cable Act provisions cited by *amici* even arguably relate.

An example will prove the point. *Amici* characterize the franchise fee authorized by 47 U.S.C. § 542 as a "tax" and a "special fee" that "single[s] out cable television" and that "bear[s] no relation to any costs [operators] might impose on public streets and rights-of-way." Amicus Br. at 9, n.8, & 11. As an initial matter, *amici* overlook the fact that the court of appeals declined to address the franchise fee issue (or any other specific franchise requirement) for fear "of rendering advisory opinions poorly disguised as sweeping dicta." Pet. App. at A68. Moreover, *amici's* franchise fee argument rests entirely on their apparent ignorance of (1) the record, which reveals that the franchise fee is designed to compensate for a franchisee's use of public property and is a generally applicable fee assessed on all City franchisees, cable and non-cable alike (CR 452 at ¶ 12; CR 450 at ¶ 12; CR 455 at ¶ 6; CR 444 at ¶ 10); and (2) applicable law, which makes plain that a franchise fee is not a tax but is a charge for use of public

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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property. *E.g., Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272 (1955). In short, the Court should decline *amici's* invitation to consider hypothetical questions that are far removed from the questions presented and the record in this case.